SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JEFFREY K. OING J.S.C. PART 48
Justice

Index Number : 652813/2012
ALTERRA AMERICA INSURANCE
vs.
NATIONAL FOOTBALL LEAGUE
SEQUENCE NUMBER : 017
STAY PROCEEDINGS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____
Answering Affidavits — Exhibits _____ No(s). _____
Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Mtn is decided in accordance w/ the accompanying memorandum decision/order of this court.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10/28/16

JEFFREY K. OING, J.S.C.
J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☒ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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ALTERRA AMERICA INSURANCE COMPANY,

Plaintiff,

-against-

NATIONAL FOOTBALL LEAGUE, NFL PROPERTIES, LLC, TIG INSURANCE COMPANY, CENTURY INDEMNITY COMPANY, CHARTIS PROPERTY CASUALTY COMPANY, DISCOVER PROPERTY & CASUALTY INSURANCE COMPANY, FEDERAL INSURANCE COMPANY, GREAT NORTHERN INSURANCE COMPANY, GUARANTEE INSURANCE COMPANY, HARTFORD ACCIDENT & INDEMNITY COMPANY, NORTH RIVER INSURANCE COMPANY, ONE BEACON AMERICA INSURANCE COMPANY, UNITED STATES FIRE INSURANCE COMPANY, ACE AMERICAN INSURANCE COMPANY, ILLINOIS UNION INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, ARROWOOD INDEMNITY COMPANY, CHARTIS SPECIALTY INSURANCE COMPANY, CONTINENTAL CASUALTY COMPANY, CONTINENTAL INSURANCE COMPANY, ILLINOIS NATIONAL INSURANCE COMPANY, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, MUNICH REINSURANCE AMERICA, INC., NEW ENGLAND REINSURANCE CORPORATION, ST. PAUL PROTECTIVE INSURANCE COMPANY, TRAVELERS CASUALTY & SURETY COMPANY, TRAVELERS INDEMNITY COMPANY, TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, VIGILANT INSURANCE COMPANY, WESTCHESTER FIRE INSURANCE COMPANY, XL INSURANCE AMERICA, INC. and COMPANIES ABC-XYZ, inclusive,

Defendants.

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Index No.: 652813/2012

Mtn Seq. No. 017

DECISION AND ORDER

DISCOVER PROPERTY & CASUALTY COMPANY, ST. PAUL PROTECTIVE INSURANCE COMPANY, TRAVELERS CASUALTY & SURETY COMPANY,

TRAVELERS INDEMNITY COMPANY AND
TRAVELERS PROPERTY CASUALTY COMPANY
OF AMERICA,

Plaintiffs,

-against-

NATIONAL FOOTBALL LEAGUE, NFL
PROPERTIES, LLC, ALTERRA AMERICA
INSURANCE COMPANY, FIREMAN'S FUND
INSURANCE COMPANY, TIG INSURANCE
COMPANY, CENTURY INDEMNITY COMPANY,
FEDERAL INSURANCE COMPANY, GREAT
NORTHERN INSURANCE COMPANY, GUARANTEE
INSURANCE COMPANY, HARTFORD ACCIDENT
& INDEMNITY COMPANY, NORTH RIVER
INSURANCE COMPANY, U.S. FIRE INSURANCE
COMPANY, ACE AMERICAN INSURANCE COMPANY,
ILLINOIS UNION INSURANCE COMPANY,
ALLSTATE INSURANCE COMPANY, AMERICAN
GUARANTEE AND LIABILITY INSURANCE
COMPANY, ARROWOOD INDEMNITY, COMPANY,
CHARTIS SPECIALTY INSURANCE COMPANY,
CHARTIS PROPERTY CASUALTY COMPANY,
CONTINENTAL CASUALTY COMPANY,
CONTINENTAL INSURANCE COMPANY,
ILLINOIS NATIONAL INSURANCE COMPANY,
MUNICH REINSURANCE AMERICA, INC.,
NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA, NEW
ENGLAND REINSURANCE CORPORATION,
ONE BEACON AMERICA INSURANCE COMPANY,
VIGILANT INSURANCE COMPANY,
WESTCHESTER FIRE INSURANCE COMPANY,
XL INSURANCE AMERICA, INC., DOE
DEFENDANTS 1-100,

Defendants.

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Index No. 652933/2012

Mtn Seq. No. 013

DECISION AND ORDER

JEFFREY K. OING, J.:

The Underlying Dispute

These two consolidated insurance coverage disputes arise out of an underlying action, In Re National Football League Players' Concussion Injury Litigation, MDL 2323, venued in the United States District Court for the Eastern District of Pennsylvania before Judge Anita B. Brody (the "MDL Action"). The MDL Action includes numerous lawsuits commenced by former National Football League players and their families alleging certain neurological injuries and conditions as a result of concussive and subconcussive impacts the former players sustained during their NFL careers.

Judge Brody granted final approval of a class settlement, the amount of which is estimated to be in the range of $1 billion, on May 8, 2015 (the "class settlement"). Certain objectors to the settlement appealed, and on April 18, 2016 a three-judge panel of the Third Circuit of the United States Court of Appeals affirmed Judge Brody's decision. The Third Circuit denied the objectors' petition for rehearing en banc. The objectors then filed a petition seeking review from the United States Supreme Court. A decision on the petition is pending.

In addition, more than 150 players opted out of the class settlement (the "opt-out litigation"). The record demonstrates that no discovery has taken place in the opt-out litigation, and that Judge Brody will decide how to proceed with that discovery at the appropriate time. The MDL Action is comprised of the class settlement and the opt-out litigation.

The Declaratory Judgment Actions

Plaintiff insurers, Alterra America Insurance Company and Discover Property & Casualty Company ("insurers"), commenced these declaratory judgment actions against their insured, National Football League and NFL Properties, LLC (collectively, the "NFL entities"), and other insurance companies that insured the NFL entities, to seek a judicial determination of their and the other named insurers' coverage obligations to the NFL entities arising out MDL Action (the "consolidated actions").

Procedural History

Plaintiff insurers commenced these consolidated actions in August 2012. On March 15, 2013, I denied the NFL entities motions to dismiss the consolidated actions.[1] With respect to

[1]I granted that branch of the motion to dismiss the Alterra plaintiffs' first cause of action (duty to defend), third cause of action (duty to cooperate) and fourth cause of action (other insurers duty), and dismissed those claims without prejudice

the indemnification-related claim, I stayed prosecution of that claim pending resolution of the MDL Action because of discovery-related concerns that may prejudice the NFL entities (Tr., NYSCEF Doc. No. 290 [Index No. 652813/2012] at pp. 27-48). The parties engaged in limited discovery, mostly pertaining to production of insurance policies and publicly-available pleadings from the MDL Action. The parties appeared for a status conference on September 13, 2013. The NFL entities successfully prevailed in convincing me to adjourn the matter to November 16, 2015, which happened to be the date after the class settlement was finalized.

At the November 16, 2015 status conference, plaintiff insurers sought to move forward with discovery in the consolidated actions. Over the NFL entities objections, I concluded that "the time has come to really move forward" with this case (Tr., NYSCEF Doc. No. 347 [Index No. 652813/2012] at p. 24). Given the approaching holiday season, I instructed counsel to return for a status conference on January 11, 2016, at which time counsel should expect to proceed "full speed ahead" with discovery (Id.). Given the complexity of these consolidated actions and their inevitable cross-over with the class settlement

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(Tr., NYSCEF Doc. No. 290 [Index No. 652813/2012] at pp. 27, 51, 53).

and the opt-out litigation, I conferred with Judge Brody. Subsequent thereto, I adjourned this matter twice to April 29, 2016. In the interim, the United States Court of Appeals for the Third Circuit affirmed Judge Brody's approval of the class settlement.

At the April 29, 2016 conference, I made clear that I have "been extremely patient with this case and ... given [the NFL] all the stays that [it] asked for ... there comes a time when you need to go forward" (Tr., NYSCEF Doc. No. 378 [652813/2012] at pp. 5-6). I rejected the NFL entities' concerns that discovery in these consolidated actions jeopardizes their defense in the MDL Action, particularly the opt-out litigation:

> THE COURT: . . . The concern you have about the 150 opt-outs in terms of the documents that may be produced or that will be produced in this case is something that you're concerned about ... [that the MDL Action plaintiffs will] be able to get access. My simple answer to that, it would be just to enter a confidentiality agreement ....
>
> MR. CARROLL: We have, Your Honor. It's already in place.
>
> THE COURT: And that further, so that there can't be any arguments from the plaintiffs ... if [the MDL Action plaintiffs] want to have access to it they're going to have to come to me and ask for access and then I'll go through the whole argument, we'll see whether those documents should be produced or should not be produced. So that's sort of the remedy towards whether or not your concerns about documents being produced.

> ... I don't think it's something that's insurmountable, but I think it's at a time when we have to go forward.

(Id.). Having heard the NFL entities' additional arguments to stay this matter, one being that I should consider deferring to Judge Brody issues concerning discovery in the first instance, I ended the discussion with the following commentary to the NFL entities' counsel:

> THE COURT: ... I hear you loud and clear, but at the end of the day my answer still has not changed right now, and that is I am going forward with this case. I will issue whatever discovery orders I believe need to be issued. If you disagree you can seek Appellate review here, in the First Department. ... That is your remedy at this point in time. You have now a record where I'm not going to wait anymore. Once that first discovery order is issued and you believe it's going to conflict with the case in the MDL over in the Third Circuit you can make that argument, because you haven't waived it, it's here in the record, before the First Department with respect to the first discovery order and the First Department will either give you a stay that you're looking for or say go ahead, do discovery. So that's my answer to you right now.

(Id. at pp. 10-12). These motions ensued.

Relief Sought

In these consolidated actions, the NFL entities separately move, pursuant to CPLR 2201, for an order staying the prosecution of all indemnity-related claims. In the event of an adverse determination, the NFL entities move, pursuant to CPLR 5519(c),

for a stay pending an appeal to the Appellate Division, First Department of my decision and order. These motions (mtn seq. nos. 013 and 017) are hereby consolidated for disposition. I held oral argument on these consolidated motions on October 13, 2016 (NYSCEF Doc. No. 274).

Contentions

The NFL entities argue that under New York law I am required to stay the indemnity-related discovery in these consolidated actions until there is a final resolution of the MDL Action, namely, resolution of the objectors' petition for review to the United States Supreme Court. In making this argument, they point out that New York courts apply a "bright-line rule" that "[a]lthough declaratory judgment claims as to whether the insurer owes a duty to defend are justiciable, claims for declaratory relief related to the duty to indemnify cannot proceed until full and final resolution of the underlying litigation, including exhaustion of appeals" (NFL entities' Mem. of Law [NYSCEF Doc. No. 362], at p. 3 [emphasis in the original]). To support this proposition, the NFL entities rely on Cordial Greens Country Club, Inc. v Aetna Cas. & Sur. Co., 41 NY2d 996 (1977) and its progeny.

The NFL entities further argue that pursuant to CPLR 2201 discovery should be stayed otherwise they will be prejudiced in defending the MDL Action, specifically the opt-out litigation. They contend that by allowing discovery on indemnity-related claims to go forward the insurers will essentially be assisting plaintiffs with respect to establishing the NFL entities' liability. For instance, the insurers have asserted an "expected or intended" defense, i.e., that the NFL entities "expected or intended" the injuries suffered by the plaintiffs in the MDL Action (NFL entities' Mem. of Law [NYSCEF Doc. No. 362] at pp. 3, 14). Thus, while such discovery ostensibly may address indemnity-related issues, the NFL entities contend it may also be used, to their prejudice, to establish their liability in the MDL Action.

The NFL entities also argue that to permit discovery to go forward in the consolidated actions in advance of MDL Action would deprive Judge Brody of her jurisdictional authority to manage and control discovery in the first instance and would result in a misallocation of resources (NFL entities' Mem. of Law [NYSCEF Doc. No. 362] at p. 4).

In arguing for a stay of discovery in these consolidated actions, the NFL entities focus solely on the indemnity-related

coverage issues. Their position is that if I stay discovery for these issues, then such a stay would necessarily extend to defense-related coverage issues (Tr., NYSCEF Doc. No. 402 [Index No. 652813] at pp. 10-11). Plaintiff insurers disagree and take the position that discovery must proceed with respect to coverage issues concerning defense and indemnity (Id. at pp. 8-10).

Discussion

The NFL entities' argument that I must stay discovery with respect to indemnity under Cordial Greens Country Club, Inc. v Aetna Cas. & Sur. Co., 41 NY2d 996 (1977) and its progeny is unavailing. A close reading of Cordial Greens clearly demonstrates that any determination of the indemnity-related issues must await resolution of the underlying personal injury action for which insurance coverage is sought (Id. at 997; see Frontier Insulation Contractors, Inc. v Merchants Mutual Ins. Co., 91 NY2d 169, 178 [1997][Court declines to pass on the question of defendants' duty to indemnify at this early juncture, which predates any ultimate determination of the insurers' liability]; Allcity Ins. Co. v Fisch, 32 AD3d 407, 408 [2d Dept 2006][declaration on indemnity issue premature prior to final determination of the underlying action]). Thus, although the NFL entities are correct in pointing out that indemnity-related

coverage issues should await final resolution of the MDL Action, they fail to appreciate the procedural posture of the cases they rely on in making this argument. Procedurally, those cases indicate that the determinations were the result of dispositive motions or a trial. Here, plaintiff insurers are not seeking a determination concerning the indemnity coverage at this juncture. They merely, after waiting patiently for nearly four years, seek discovery. The frustration is palpable:

> MR. CARROLL: ... I have been up before your Honor three times arguing this, and three times I have walked out of here with discovery going forward, and three times, they have somehow thrown up another roadblock.
>
> * * *
>
> Because twice now I have walked out of court and said we are getting what we should have gotten years and years ago. This has to stop. They will do anything to stop us from defending our case.

(Tr., NYSCEF Doc. No. 402, at p. 12). Under these circumstances, discovery concerning indemnity coverage issues is not the same as adjudicating them. To that point, adjudication, however, may be appropriate in certain instances:

> [t]he general rule is that a declaratory judgment as to a carrier's obligation to indemnify may be granted in advance of trial of the underlying tort action <u>only if it can be concluded as a matter of law that there is no possible factual or legal basis on which the insurer may eventually be held liable under its policy.</u>

(First State Ins. Co. v J & S United Amusement Corp., 67 NY2d 1044, 1046 [1986][emphasis added]). The highlighted language unmistakably indicates that in order to reach any conclusion "as a matter of law that there is no possible factual or legal basis on which the insurer may eventually be held liable under its policy" discovery is required.

Next, the NFL entities resort to CPLR 2201, which provides that a court "may grant a stay of proceedings ... upon such terms as may be just." Although a stay may be warranted in one action where there is complete identity of the parties, claims and relief sought in a related action (952 Associates, LLC v Palmer, 52 AD3d 236 [1st Dept 2008]), a stay may also be warranted when there is a substantial identity between two separate actions (Asher v Abbott Laboratories, 307 AD2d 211 [1st Dept 2003]). As such, even where there is not complete identity of the parties, consideration of "the goals of judicial economy, orderly procedure and the prevention of inequitable results", together with whether there are "overlapping issues and common questions of law and fact" and whether "the determination of [a related] action may dispose of or limit issues", in the action sought to be stayed, all factor into the stay application (Belopolsky v Renew Data Corp., 41 AD3d 322 [1st Dept 2007]).

To begin, there is no complete identity of the parties in these consolidated actions with the MDL Action. Although the NFL entities are defendants in these actions, plaintiffs are completely different. Also, the claims advanced in the MDL Action are essentially negligence and fraud based, whereas the claims in the consolidated actions concern coverage issues.

The NFL entities' concern -- that absent a stay they will be prejudiced in defending the MDL Action given that discovery in the indemnity-related claims would assist the MDL Action plaintiffs with respect to establishing the NFL entities' liability -- is unfounded. Indeed, there is always unavoidable discovery tension between declaratory actions concerning coverage issues and the underlying actions for which coverage is sought. The fact that discovery in these consolidated actions could be sought to be used in the MDL Action is not, in and of itself, a basis for a stay. Indeed, such discovery may eventually be produced in the MDL Action. Whether it is produced here or in the MDL Action, or whether there is some overlap, are not bona fide reasons to stay discovery herein. In that regard, the NFL entities argue that discovery should proceed in the MDL Action in the first instance. That argument is unavailing. Other than a stay, there is no rule that provides for that priority. Also,

the NFL entities have failed to show that discovery is underway in the MDL Action.

As to their concern that plaintiff insurers would seek to depose individuals, that is an overreach given the fact that there has only been limited discovery at this point in time (Tr., NYSCEF Doc. No. 402 [Index No.652813/2012] p. 42). Any attempt to conduct a deposition at this juncture, unless circumstances warranted, would be premature. Further, any concern that discovery deemed confidential would be disseminated is addressed by way of the parties' confidentiality order. If the MDL Action plaintiffs seek to set aside that order, I will address that issue at the appropriate time. Plaintiff insurers have waited long enough and have indulged me. The time is now. Under these circumstances, I find that the NFL entities have failed to demonstrate that a stay of discovery is warranted.

The NFL entities' motion, pursuant to CPLR 5591(c), for a stay pending appeal of this decision and order is denied without prejudice to renew before the Appellate Division, First Department.

Accordingly, it is hereby

ORDERED that the NFL entities' motion for a stay is denied; and it is further

ORDERED that the NFL entities' motion, pursuant to CPLR 2201, for a stay is denied; it is further

ORDERED that the NFL entities' motion, pursuant to CPLR 5519(c), for a stay pending appeal is denied without prejudice to renew before the Appellate Division, First Department; it is further

ORDERED that counsel shall resubmit proposed case management orders, in editable format, on or before by November 9, 2016.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 10/28/16

HON. JEFFREY K. OING, J.S.C.

JEFFREY K. OING
J.S.